Melayu Bersatu (Baru)' in any of their publications. The appellants had applied for certain paragraphs in the statement of claim to be struck out on the ground that they disclosed no cause of action or otherwise were an abuse of the process of the court. The learned judge said in his judgment that he would have dismissed the prayer but for his impression that the interim order as varied would be satisfactory to all parties.

Held, allowing the appeal:

(1) As the official name of the political party registered is according to the gazette notification 'Pertubuhan Kebangsaan Melayu Bersatu (Baru)' or 'UMNO' it is obvious that the injunction as varied cannot stand.

(2) The application under O 18 r 19 to strike out certain paragraphs in the statement of claim had not been properly disposed of by the learned judge and the application should be heard by another judge.

Legislation referred to
Rules of the High Court 1980 O 18 r 19

Appeal from: Civil Suit No S6-25-128-88 (High Court, Kuala Lumpur)

Lim Chor Pee (*Syed Hamid Albar* with him) for the second appellant.

Yeoh Poh San (*Miss Lim Swit Boey* with him) for the respondents.

Mohamed Zaki bin Azmi holding watching brief for UMNO.

Hashim Yeop A Sani SCJ (delivering the oral judgment of the court): This is an appeal against the refusal of the learned judge to set aside an interim injunction dated 5 August 1988. Mr Yeoh Poh San, counsel for the respondents, conceded that the original interim order granted by the learned judge was too wide. The learned judge, after hearing arguments, varied the order on 1 September 1988. The order as varied in effect directed that the appellant and another, each of them by themselves or their servants or agents or any of them be restrained from describing Pertubuhan Kebangsaan Melayu Bersatu by any name other than 'UMNO Baru' or 'Pertubuhan Kebangsaan Melayu Bersatu (Baru)' in any of their publications.

Looking at the gazette notification 251/88 dated 18 February 1988 it seems clear that the official name of the political party registered is 'Pertubuhan Kebangsaan Melayu Bersatu (Baru)' or 'UMNO'. It is obvious to us that in the face of the gazette notification 251/1988 the injunction as varied cannot stand.

As regards the appellants' application that para 11(14)-11(34) of the statement of claim be struck out on the grounds that they disclose no cause of action or otherwise an abuse of the process of the court, the learned judge has said in his judgment that 'he would have dismissed the prayer' but for his 'impression' that the interim order as varied would be satisfactory to all parties. We are of the view that the application under O 18 has not been properly disposed of.

The appeal is accordingly allowed with costs here and below and the interim injunction set aside. We also direct that the application under O 18 r 19 to strike out certain paragraphs in the statement of claim be heard by another judge.

Deposit to be refunded to the appellant.

Appeal allowed.

Solicitors: *Albar Zulkifly & Yap*; *Yeoh Poh San & Co.*

Reported by *Prof Ahmad Ibrahim*

Rothmans of Pall Mall (M) Bhd v Neo Kim Har & Anor

HIGH COURT (KUALA LUMPUR) – CIVIL SUIT NO C125 OF 1984
GUNN CHIT TUAN J
19 SEPTEMBER 1988

Bailment – Carriage of goods – Consignment stolen whilst in care, custody and control of carriers and their servants – Liability – Insurance taken out by owner of goods – Subrogation – Evidence Act 1950, s 114(g) – Contracts Act 1950, ss 104 & 105

In this case the defendants had entered into a contract with the plaintiff to carry the tobacco products of the plaintiff to its distributors. On 20 December 1922, the defendants sent their motor vehicle to the premises of the plaintiff to collect a consignment of cigarettes and tobacco for delivery to Malacca and Johore. The driver and an attendant of the said vehicle were at the material time employees of the defendants and the said consignment was stolen whilst under the care, custody and control of the defendants and/or their servants. The plaintiff had insured the goods and had been paid by the insurers, who then sued the defendants for the loss suffered.

Held, granting the application:

(1) Where as in this case there is a bailor and bailee relationship, the bailee is under a duty to take all reasonable precautions to protect the goods from theft and if the bailee entrusts that duty to his servants or agents he is answerable for the manner in which those servants or agents carry out their duty. If the servants or agents steal the goods or make away with them the bailee, as master, is liable.

(2) The onus was on the bailee to prove that the loss of the goods bailed was not caused by any fault of his or any of his servants or agents to whom he entrusted the goods for safe keeping. In this case the defendants have not shown how the goods were stolen and have failed to discharge the onus, which was upon them, of proving that what happened was not the result of their negligence or the negligence and/or misconduct of their servants. In fact the defendants were negligent in having employed a driver without having taken reasonable care to make sufficient inquiries to check his character with regard to honesty and trustworthiness.

(3) The insurance policy taken out by the plaintiff did not cover the liability of the defendants who must pay for the value of the goods if it had been delivered to them as per the delivery

orders and without taking into consideration the proceeds of insurance.

(4) Judgment should be given for the plaintiff as prayed. As the insurance company was subrogated to the rights of the plaintiff and has brought the action in the name of the plaintiff, it would therefore be entitled to recover the sum claimed with interest.

Cases referred to

1 *Brice & Sons* v *Christiani & Nielsen* (1928) 44 TLR 335 (refd)
2 *Port Swettenham Authority* v *TW Wu & Co (M) Sdn Bhd* [1975] 2 MLJ 73 (follid)
3 *Morris* v *Martin* [1966] 1 QB 716 (refd)
4 *Port Swettenham Authority* v *TW Wu & Co (M) Sdn Bhd* [1978] 2 MLJ 137 (follid)
5 *Williams* v *Curzon Syndicate Ltd* (1919) 35 TLR 475 (refd)
6 *John Carter (Fine Worsteds) Ltd* v *Hanson Haulage (Leeds) Ltd* [1965] 2 QB 495 (refd)
7 *Heskell* v *Continental Express Ltd & Anor* [1950] 1 All ER 1033 (refd)
8 *The 'Yasin'* [1979] 2 Lloyd's Rep 45 (refd)
9 *The London Assurance Company* v *Sainsbury & Anor* 99 ER 636 (refd)
10 *Castellain* v *Preston* (1883) 11 QBD 380 (follid)
11 *King* v *Victoria Insurance Co Ltd* [1896] AC 250 (follid)
12 *Mason* v *Sainsbury* 99 ER 538 (follid)
13 *Clark* v *Blything Inhabitants* 107 ER 378 (follid)

Legislation referred to

Contracts Act 1950 ss 104, 105
Evidence Act 1950 s 114 (g)

R Abraham for the plaintiff.
L Ponniah for the defendants.

Cur Adv Vult

Gunn Chit Tuan J: In this case the following facts were not disputed. On 20 December 1982, Neo Kim Har and Low Tiong Mee both trading as Neo Kim Har and Low Tiong Mee Transport Co ('the defendants') sent motor vehicle no BS 9626 to the premises of Rothmans of Pall Mall (M) Bhd ('the plaintiff') to collect a consignment of cigarettes and tobacco for delivery to Malacca and Johore. The driver and an attendant of the said vehicle were at the material time employees of the defendants and the said consignment was stolen whilst in the care, custody and control of the defendants and/or their servants.

Both parties called one witness each. The plaintiff's witness, one Yang Yim Ming (PW1), was its chief accountant and his duties were basically to look after the plaintiff's financial matters. He told the court that the plaintiff is an importer and manufacturer of tobacco products. The witness was referred to a letter dated 17 November 1980 (p 1 of the agreed bundle of documents marked 'B') which was a letter to the defendants by the plaintiff inviting the former to tender for a three-year contract for the transportation of the plaintiff's products to its distributors in West Malaysia for the period 1 January 1981 to 31 December 1983. The defendants replied to the plaintiff's said letter on 27 November 1980 (p 3 of the agreed bundle of documents marked 'B') enclosing their quotations (pp 5-6 of the agreed bundle of documents marked 'B'). On 12 December 1980, the plaintiff replied to the defendants (p 7 of the agreed bundle of documents marked 'B') to inform them that they have been appointed the sole carrier for its tobacco products to its distributors for three years from 1 January 1981 to 31 December 1983 subject to the following conditions:

> (1) It is your responsibility to provide lorries even from other companies at the agreed rate in the event of any breakdown of your lorries and you will bill us accordingly.
>
> (2) The three lorries with Rothmans transport licences will have closed bodies and we will pay for the painting of these vehicles.

The defendants replied on 15 December 1980, (p 9 of the agreed bundle of documents marked 'B') accepting their appointment as the sole carrier for the plaintiff's products for three years from 1 January 1981 to 31 December 1983.

PW1 told the court that he was not involved in the selection of tenders and that at that point of time there was no written agreement between the parties. There was no reference to insurance coverage in the plaintiff's letter of 12 December 1980, (p 7 of the agreed bundle of documents marked 'B') and insurance was only taken out by the plaintiff. He then referred to the relevant insurance policy (pp 10-13 of the agreed bundle of documents marked 'B') and pointed out that the said policy only showed the name of the plaintiff as the assured.

The witness then said that the plaintiff delivered a consignment of tobacco products to the defendants at its factory in Jalan University, Petaling Jaya. The consignment was delivered on to lorry no BS 9626. Documents were issued in respect of that delivery and there were seven delivery orders which were produced in court (exh P1). The value of the goods was $177,849.57 as shown in a summary of delivery orders (exh P2) which he had prepared. The said consignment did not reach the consignees. The witness then referred to exh P1 and pointed out that the name of the recipient of the goods was one Chow Fatt, Identity Card No 8146053. The plaintiff wrote to the defendants on 23 December 1982 (p 15 of the agreed bundle of documents marked 'B') to inform the defendants that as the consignment in transit was in their custody, they were holding them responsible for the loss of the consignment. The defendants replied on 27 January 1983 (p 17 of the agreed bundle of documents marked 'B') to say that they were not liable or responsible for the loss of the goods.

Under cross-examination PW1 confirmed that the defendants were transporting goods for the plaintiff prior

to the letter of 17 November 1980 (p 1 of the agreed bundle of documents marked 'B'). He was not sure, however, when the defendants started transporting goods for the plaintiff, nor did he know who had negotiated contracts with the defendants previously. He admitted that he was not sure whether there were written agreements before the contract in question in which he was involved. But he confirmed that it was agreed that the plaintiff should take out insurance to cover the plaintiff's goods in all forms of transportation by road. He also confirmed that the defendants were the plaintiff's sole distributors and that road transportation of the goods was only made through the defendants. When he was referred to the insurance policy (p 10 of the agreed bundle of documents marked 'B') the witness agreed that it covered loss of transportation by road, and confirmed that the plaintiff had lodged a claim with the insurance company which had paid its claim. When he was referred to the rates quoted by the defendants for transportation of the plaintiff's products (pp 22-23 and p 29 of the agreed bundle of documents marked 'B') the witness agreed that the rates were exclusive of insurance and that the rates would have been higher if insurance coverage had been included.

The witness then stated that the lorries used were covered lorries and were only for carrying the plaintiff's products. The licences for the lorries were in the name of the plaintiff but he was not sure in whose name the lorries were registered. He confirmed that the licences for the lorries were 'C' licences which only allowed carriage of the licensee's goods and that the transporter could not carry other people's goods.

When questioned on the value of the cigarettes PW1 stated that the summary of delivery orders prepared by him (exh P2) contains their sale values which included the plaintiff's profit margin. He could not comment on the profit margin as it was confidential information. Finally, when challenged, the witness said that he could not remember any conversation with the defendants' manager about insurance after the theft. He said it was possible that he might have spoken to a Mr Chegne after the incident but he could not remember it. When challenged again he replied that he could not remember telling Mr Chegne that the goods were insured and that there was nothing to worry about. He also said that he did not tell Mr Chegne that it was not necessary to insure the goods twice and added that during his time the defendants were not required to take up insurance.

During re-examination the witness said that the parties had traded for 12 years before they decided on a written agreement to streamline operations. He stated, however, that the plaintiff was to take out insurance for the benefit of the plaintiff alone and he could not remember any discussions of benefit of insurance for the defendants. He added that the question of insurance was only raised in the defendants' letter of 28 December 1983 (p 22 of the agreed bundle of documents marked 'B'). At the date of the incident the question of insurance was not discussed. He confirmed that the plaintiff had submitted a claim to the insurance company for the sum of $177,849.57 and that the plaintiff has since received that amount.

The defendants' witness was one Chegne Teng Hock (DW1) who was their manager. He has been with the defendants since 1979 and stated that the plaintiff did not require the defendants to take up insurance since they started trading in 1965. He claimed that he had knowledge of the trading relations between the parties prior to 1979 because he was then employed by Rothmans as their storekeeper. He also claimed that he had knowledge of the contracts between the parties and that it was an understanding between them that the plaintiff would take out insurance to cover the defendants.

On the hiring of employees, DW1 stated that they were made on the recommendation of friends or through existing drivers. The employees have to fill in a form similar to the one shown in p 40 of the agreed bundle of documents marked 'B'. After completion of such a form he would check the details such as the identity card number, the driver's licence and other particulars such as marital status and the number of children etc. He told the court that the driver concerned was introduced to the plaintiff and had made about fifteen trips into Rothmans' premises and that for each entry his identity card was checked. That driver was recommended to them by another transport company which had told him that he was hardworking. He said that in every lorry there would be two persons together all the time and that the employees were rotated from time to time. The lorry involved was a closed lorry which was padlocked and was one of the three Rothmans' lorries with a 'C' licence taken out by the plaintiff who owned them. The defendants only supplied a driver and an attendant and were the only transporter for the plaintiff at that time as they did not transport goods for others. They could only transport Rothmans' products and must leave at any time and to any destination chosen by the plaintiff. On the day in question the attendant of the lorry had gone to get some black oil. The driver was supposed to come back and fetch him but the attendant later rang him when the driver did not show up. He met the attendant and then looked around for the lorry. He could not find the lorry and then went to the driver's house in Setapak but there was nobody inside it. He later made a report at the police station. That was the first time a consignment was lost after 15 years and during that period there was no hijacking which became common later on and none of their employees has proved to be dishonest before the incident.

The witness then said that the defendants did not take out insurance to cover themselves because they were told the plaintiff had taken out insurance and that the transporter would be covered. That was the arrangement from the beginning when there was no written agreement. When he was referred to the insurance policy at p 10 of the agreed bundle of documents marked 'B', the witness said that he was told that the policy would cover transportation and he understood it to cover transportation by them. If they had taken out insurance their transport rates would have been higher. Their rates were below prevailing rates because the plaintiff said that they would take out insurance to cover them. Finally the witness claimed that after the incident he did have a meeting with PW1 who told him that they could not take out another policy for the same products.

Under cross-examination, DW1 stated that when he hired Chow Fatt, he needed an extra driver. He did not receive many applications for the job but disagreed that at that time it was difficult to get lorry drivers. When challenged he disagreed that when he hired Chow Fatt there were several instances of theft from lorries. He interviewed Chow Fatt alone and made the decision to employ him after asking him various questions including those concerning his social activities. He did not record his answers but claimed that he could still remember them. He also claimed that the driver was recommended by a friend called Tony who is a sort of manager in Guinness who had written a chit stating that the driver was hard-working and reliable. He did not know Tony's full name but said that Chow Fatt had been employed by the former for about half a month. He did not ask Chow Fatt what his employment was before he worked for Tony and admitted that the only testimonial was from Chow Fatt's previous employer where he had worked for only half a month. He then said that he required information about the employees' children for submission to the Income Tax Department and had checked their identity cards. The driver concerned did not have any EPF or Socso and he did not keep a copy of his identity card. Chow Fatt was immediately asked to drive the plaintiff's lorries in the company of another driver for two occasions and he was in their employment for about two and a half weeks prior to the incident. He agreed with counsel that it was important to engage honest drivers as the consignments were valuable and there was a possibility of theft but he had gained the impression that Chow Fatt was honest because he was recommended by Tony. He agreed that his impression was based on what Tony had told him and he never thought of asking Chow Fatt what he did before he joined Tony. The driver was put on probation for one month and was still on probation when the incident occurred. DW1 admitted that he had entrusted the driver to transport the last consignment.

DW1 also alleged that the defendants were told that the insurance covered them and that they need not worry and that when he went to see PW1 he was told that they were covered. When he was referred to the defendants' letter of 28 December 1983 (p 22 of the agreed bundle of documents marked 'B'), he agreed that that was written after the incident and that it referred to insurance. He was then referred to the earlier correspondence in the agreed bundle of documents marked 'B' and agreed that there was no reference in them to insurance and also agreed that the question of insurance was only raised in that letter of 20 December 1983 (p 22 of the agreed bundle of documents marked 'B'). The witness also admitted that he had received a copy of the relevant insurance policy but could not remember when he received it. After he was referred to the following clause of the said policy (p 13 of the agreed bundle of documents marked 'B'):

> This contract does not cover the interest of any other person, but this shall not prevent a transfer of the insurance by the assured or assignee.

DW1 admitted that the defendants' names were not mentioned in the said insurance policy.

During re-examination DW1 stated that he had employed a new driver after Chow Fatt and had followed the same procedure of interview. All the other drivers employed by him were honest. He has not called for a general interview when employing drivers because he required recommendations. He then claimed to have known Tony for ten years and that the latter had recommended drivers to him previously and those drivers had proved to be satisfactory. He decided to give Chow Fatt a trial on Tony's recommendation and on his own judgment. In conclusion he claimed once again that when he went to see PW1 about a new contract, he also spoke to him about insurance and PW1 mentioned that the defendants need not buy insurance. He said that Rothmans insisted that they should take up their own insurance so that they could claim for any loss.

Having seen and heard both witnesses, I found the plaintiff's witness (PW1) more reliable and truthful. But I could not believe the defendants' witness (DW1) when he claimed that he had knowledge of the parties' trading relationship since 1965 although he only joined the defendants in 1979 after his previous employment with the plaintiff as a storekeeper! I therefore rejected his evidence that he had knowledge of the previous oral contracts between the parties and that there was an understanding or arrangement that the plaintiff would take out insurance to cover the defendants' liability. I found that there was no evidence to support the defence allegation that there was such an understanding or arrangement that the plaintiff would take out an insurance policy which also covered the defendants' liability.

On the hiring of Chow Fatt as a driver for the defendants, I found that DW1 was negligent in employing him on inadequate testimonial, ie on the recommendation of Tony who had written a chit stating that the driver was hardworking and reliable. The said Tony was not called as a witness nor was any chit written by him produced in court. I therefore considered that the presumption under s 114(g) of the Evidence Act 1950 should be applied. I also found that it was negligence on the part of the defendants to have employed a driver who had only worked for half a month for his previous employer. DW1 should have made adequate inquiries as to his previous character and/or as to his suitability for a position where he would be entrusted with goods worth hundreds of thousands of dollars. When DW1 discovered that the driver, who was 34 years old, did not have any EPF or Socso that should have aroused his suspicion and put him on his guard.

After referring to the law in relation to bailment in the following ss 104-105 of the Contracts Act 1950:

> 104 In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality, and value as the goods bailed.
>
> 105 The bailee, in the absence of any special contract, is not responsible for the loss, destruction, or deterioration of the thing bailed, if he has taken the amount of care of it described in section 104.

Mr Ponniah, counsel for the defendants, referred to the evidence of DW1 and stated that the procedure used by the defendants to employ drivers has been a safe one for many years. He also stated that hijacking was not common in 1982 and that a driver and an attendant for each motor vehicle were sufficient for custody of the goods bailed.

Counsel then pointed out that the rates in this case were reduced because no insurance was taken out by the defendants. He referred to the case of *Brice & Sons* v *Christiani & Nielsen*,[1] in which the defendants hired a crane-barge from the plaintiffs, one of the terms of the contract being that the plaintiffs would insure the crane against all risks, the defendants paying the premium. The plaintiffs took out a policy covering, as they thought, all risks. The crane, when proceeding to lift a load, broke away from its bedplate and fell over and was damaged. It was then found that the accident was not covered by the policy, and the defendants refused to pay for the damage. In an action for breach of contract, it was held by Rowlatt J in the King's Bench Division that though the defendants had failed to discharge the onus, which was upon them, of proving that what happened was not the result of negligence by their servants, yet, as the agreement in regard to insurance was intended to be an arrangement for the benefit of both parties, and as the accident came within the description 'all risks' and the defendants had stipulated that they were not to bear those risks, the action failed. Mr Ponniah contended that there was such an arrangement in this case, ie that the plaintiff would take out insurance to cover the defendants. He also referred to the policy in question (p 11 of the agreed bundle of documents marked 'B') and pointed out that there was an 'all risks' clause covering transportation by road per lorry or van. Counsel contended that it was the intention that the policy taken out by the plaintiff was also to cover the defendants and that there was an oral agreement in existence to that effect for eighteen years.

Finally Mr Ponniah contended that it was the duty of the plaintiff to prove its loss. He referred to the evidence of PW1 and submitted that the plaintiff had not proved damages. He also stated that the pleadings show that Rothmans of Pall Mall (M) Bhd was the plaintiff and PW1 has stated that it has been fully compensated for the loss.

Mr Abraham, counsel for the plaintiff, after referring to s 101 of the Contracts Act 1950, in which the words 'bailment', 'bailor' and 'bailee' were defined, pointed out that there was a three-year contract for the carriage of the plaintiff's goods by the defendants. He referred to the Federal Court case of *Port Swettenham Authority* v *TW Wu & Co (M) Sdn Bhd*[2] in which the Federal Court held that in cases where the bailor and bailee relationship has been established all that the plaintiff has to do is to prove that he entrusted the goods to the defendant who could not deliver them on demand. It would then be for the defendant as bailee to show that the loss was not due to his negligence. Reference was made to the following passage in the judgment of Lee Hun Hoe CJ (Borneo):

> As the goods were entrusted to the appellants they were duty bound to take all reasonable precautions to protect them from theft, loss or damage. Because of their special knowledge the burden is on them. Section 106 of the Evidence Act provides that:
>
> 'When any fact is especially within the knowledge of any person the burden of proving that fact is upon him.'

In that case the learned Chief Justice referred to *Morris* v *Martin*[3] which was a case of theft committed by the very servant who was entrusted by the bailee to clean fur. The County Court held that the bailee was not liable for the theft of the servant whose act was not 'in the scope of his employment'. In allowing the appeal the Court of Appeal held that the bailee owed the owner of the fur the duties of a bailee for reward to take reasonable care of the fur and not to convert it. In that case Lord Denning MR observed as follows:

> ... when a principal has in his charge the goods or belongings of another in such circumstances that he is under a duty to take all reasonable precautions to protect them from theft

or depredation, then if he entrusts that duty to a servant or agent he is answerable for the manner in which that servant or agent carries out his duty. If the servant or agent is careless so that they are stolen by a stranger, the master is liable. So also if the servant or agent himself steals them or makes away with them.

The decision of the Federal Court was later upheld by the Privy Council in *Port Swettenham Authority* v *TW Wu & Co (M) Sdn Bhd*[4] which held that the onus was upon the appellants under ss 104 and 105 of the Contracts Act to prove that they had taken as much care of the respondents' goods as someone of ordinary prudence would under similar circumstances have taken of its own goods of the same bulk, quality and value. It was held that if there is nothing in the provisions of the Contracts Act to establish with certainty whether the onus is upon the bailor to prove the default or upon the bailee to disprove it, those provisions must be interpreted in the light of the common law. At common law the onus is always upon the bailee to prove that the loss of any goods bailed to him was not caused by any fault of his or of any of his servants or agents to whom he has entrusted the goods for safe keeping. Accordingly the onus of proving that the loss of goods deposited with the appellants was not caused by the negligence or misconduct of their servants lay with the appellants. Reference was also made to the following passage in the judgment of their Lordships:

> When a bailee puts goods which have been bailed to him in the care of his servants for safe custody, there can be no doubt that the bailee is responsible if the goods are lost through any failure of those servants to take proper care of the goods. The heresy that any dishonest act on the part of a servant employed to take care of the goods is necessarily outside the scope of his employment, and that the master cannot be liable for the dishonest act unless done for his benefit or with his privity, was exorcised by *Lloyd* v *Grace, Smith & Co* [1912] AC 716.

Mr Abraham then stated that according to the agreed facts there was entrustment of the goods which were later stolen. He submitted that the authorities are clear that an employer was liable for theft by his servant and that the defendants had failed to discharge the burden of proving that the loss of the goods bailed to them was not caused by any fault of their own or any of their servants or agents to whom they had entrusted the goods.

Counsel then referred to the English Court of Appeal case of *Williams* v *Curzon Syndicate Ltd.*[5] In that case the plaintiff, who was a member of a residential club, of which the defendants were the proprietors, gave the manager certain jewellery to lock up in a safe in the manager's office. The rules provided that 'no claim in respect of any property alleged to have been left or lost in the clubhouse will be entertained, and neither the club nor the proprietors shall be responsible for any article of value so left or lost in the club, but small articles of value may, on application to the secretary, be deposited in the safe, but neither the club nor the proprietors shall be under any liability in respect of such deposits'. The jewellery was stolen from the safe by the night porter employed by the defendants, who before employing him had obtained references from two persons by whom he had been employed, but apparently had made no inquiry as to his previous career. After the theft it was discovered that he was an old and dangerous criminal. Despite having obtained two character testimonials yet the court held that the defendants had not used due care in engaging the night porter, and as the above rule did not negative the defendants' liability for damage due to their neglect to take such care, they were liable for the loss.

After referring to the evidence of DW1, Mr Abraham pointed out that the driver concerned had only worked for his previous employer for two weeks and DW1 never bothered to find out what he did before that. Counsel then referred to the following passage in the judgment of Sellers LJ in the case of *John Carter (Fine Worsteds) Ltd* v *Hanson Haulage (Leeds) Ltd*[6] where goods of the plaintiffs were stolen by the carrier's driver:

> A duty to check the character of a driver, who is to be entrusted with a valuable cargo in respect of his honesty and trustworthiness, seems to me as imperative as to check his competence as a driver, and a failure to take reasonable care to do so is a grave default of a carrier, likely, as the judge pointed out, to lead to loss by theft.
>
> The defendants were private carriers and as bailees of the goods for the purpose of carriage for reward were under an obligation to take reasonable care both (a) of the goods, and (b) to convey them to their destination, and there deliver in accordance with the contract.
>
> Such a contract at common law requires that a carrier should take reasonable care to provide a vehicle suitable for the carriage in contemplation and that it should be driven by a person, not only fully competent to drive, but also honest and to whom goods could be properly entrusted.

It was then submitted that the authorities indicate that employers should make sufficient inquiries but in this case the defendants have failed to exercise all due care in the selection of the driver concerned. It was also pointed out that the lorry in question was only in the care of a driver who was still on probation and an attendant. It was submitted that the defendants have failed to discharge the burden on them to show that they were not negligent.

On the question of insurance, Mr Abraham pointed out that there was no reference in the correspondence between the parties about the alleged understanding that insurance taken out by the plaintiff also covered the defendants before the date of the incident. He also pointed out that the defendants have failed to show that it was the intention of the plaintiff to take out insurance to cover the defendants and that there was no reference to insurance in the contract signed between them. Counsel submitted that the understanding of the defendants about insurance was in fact a misunderstanding as to

their true position and submitted that even if there was such an understanding it would not absolve the defendants because the loss in this case was caused by the wilful misconduct on the part of the defendants' employee.

On the loss suffered by the plaintiff and the amount which the plaintiff was entitled to recover, Mr Abraham referred to the evidence of PW1 who was the man dealing with the plaintiff's financial matters. He conceded that the sum claimed included the plaintiff's profit margin but stated that the value of the goods should be its value at the place of delivery. He then referred to the following passage in the judgment of Devlin J in *Heskell* v *Continental Express Ltd & Anor*:[7]

> Under the ordinary rule the carrier is taken to know that the consignor will lose by non-delivery the value of the goods at the place of delivery, and I suppose that under ordinary market conditions that would compensate the consignee for any loss he incurs by purchases made at the place of delivery in order to fulfil any sale he may have made.

Counsel then pointed out that the defence had failed to cross-examine PW1 on any of the delivery orders (exh P1) on which the name of the defendants' employee was stated. Counsel also referred to the summary of delivery orders (exh P2) and pointed out that here again PW1 was not cross-examined on it and submitted that the defence must be taken to have accepted them. He submitted that the loss suffered was, therefore, equivalent to the value of the consignment if it had been delivered and then referred to the following passage in the judgment of Mr Justice Lloyd in *The 'Yasin'*:[8]

> Mr Phillips, on behalf of the defendants, takes three points, all of which raise interesting questions as to the insurers' right of subrogation. I shall consider each point in turn. The first is that the plaintiffs have suffered no loss; they have been paid out by the insurers, and the insurers for whose benefit the action is being brought cannot, he says, be in a better position than the plaintiffs.
>
> On the face of it, that argument is difficult to sustain. Ever since *Bradburn* v *Great Western Railway Company* (1874) LR 10 Ex 1, it has been settled law that the proceeds of insurance are to be disregarded when assessing damages. That principle has recently been re-asserted and applied by the House of Lords in *Parry* v *Cleaver* [1969] 1 Lloyd's Rep 183; [1970] AC 1. Those were both personal injuries cases, but the principle is of general application: see *Yates* v *Whyte* (1838) 4 Bing NC 272; 132 ER 793. If the proceeds of insurance are left out of account in the present case, it obviously cannot be said that the plaintiffs have suffered no loss.

Counsel then stated that the proceeds of insurance should be disregarded in assessing damages and submitted that the plaintiff has suffered and proved loss on the balance of probabilities.

After plaintiff's counsel has made his speech in reply, Mr Ponniah sought leave to address the court on two matters. He stated briefly that subrogation had not been pleaded and there was no evidence of it; but when asked by the court, counsel was not able to quote any authority to show that subrogation must be pleaded. Counsel also stated briefly that the *Port Swettenham Authority*'s case[4] could not be relied on because the duty of care there was lower than in this case.

Be that as it may, the doctrine of subrogation has been explained as follows in 16 *Halsbury's Laws of England*, 4th Ed, at p 969:

> Where one person has a claim against another, in certain circumstances a third person is allowed to have the benefit of the claim and the remedy for enforcing it, even though it has not been assigned to him, and he is then said to be subrogated to the rights of the first person.

In this case there was no evidence that the benefit of the claim has been assigned so that the insurance company could sue the defendants in its own name: see *The London Assurance Company* v *Sainsbury & Anor*.[9] But even in the absence of a formal assignment, as there was evidence that the insurance company concerned had paid under the insurance policy it was entitled to the benefit of all rights possessed by the assured, ie the plaintiff in respect of the loss insured against (*Castellain* v *Preston*[10]). It was entitled to enforce the right of action in the plaintiff's name against the defendants who have caused the loss (*King* v *Victoria Insurance Co Ltd*[11]). The defendants cannot raise as a defence or in mitigation of damages the fact that the plaintiff as the assured has been indemnified by the insurance company (*Mason* v *Sainsbury*[12] and *Clark* v *Blything Inhabitants*[13]).

It is also clear from the authorities that where there is a bailor and bailee relationship, the bailee is under a duty to take all reasonable precautions to protect the goods from theft and if the bailee entrusts that duty to his servants or agents, he is answerable for the manner in which those servants or agents carry out their duty. If the servants or agents steal the goods or make away with them the bailee, as master, is liable. The onus was on the bailee to prove that the loss of the goods bailed was not caused by any fault of his or any of his servants or agents to whom he had entrusted the goods for safe keeping. In this case the defendants have not shown how the goods were stolen and have failed to discharge the onus, which was upon them, of proving that what had happened was not the result of their negligence or the negligence and/or misconduct of their servants. In fact the defendants were, as I have so found, negligent in having employed the driver without having taken reasonable care to make sufficient inquiries to check his character with regard to honesty and trustworthiness. Moreover, the insurance policy taken out by the plaintiff did not cover the liability of the defendants who must pay for the value of the goods if it had been delivered to them as per the delivery orders

and without taking into consideration the proceeds of insurance. I therefore gave judgment for the plaintiff as prayed for in the statement of claim. As the insurance company was subrogated to the rights of the plaintiff and has brought the action in the name of the plaintiff it would therefore be entitled to recover the said sum of $177,849.57, interest thereon at the rate of 8% pa from 14 January 1984 to the date of payment and costs.

Order accordingly.

Solicitors: *Shook Lin & Bok*; *Syed Alwi, Ng & Teoh.*

Reported by *Prof Ahmad Ibrahim*

Syed Abu Tahir a/l Mohamed Esmail v Public Prosecutor

HIGH COURT (KUALA LUMPUR) – CRIMINAL APPEAL NO 52-21-87
ZAKARIA YATIM J
13 AUGUST 1988

Criminal Law – Kidnapping of minor professing Muslim religion from lawful guardianship – Whether consent of minor relevant – Meaning of 'lawful guardian' – Whether includes mother – Rape – Intercourse with girl under 14 years of age – Whether consent of girl material – Sentencing – Offences of kidnapping and rape – Whether sentences excessive – Constitution (Amendment) (No 2) Act 1973, s 6(1) – Enactment 6 of 1961 (Selangor) – Guardianship of Infants Act 1961, ss 1(2), 5 & 6 – Penal Code (FMS Cap 45), ss 361 & 376

Evidence – Rape – Evidence given by minor – Corroboration – Whether medical evidence sufficient corroboration

Words and Phrases – 'Lawful guardian' – 'Lawfully entrusted' – Penal Code (FMS Cap 45), s 361

The appellant was convicted in the Sessions Court of the offence of kidnapping a female Muslim minor aged 13 years and 10 months from the lawful guardianship of her mother and of raping the minor. The minor's parents were Muslims. Both offences were alleged to have been committed in the Federal Territory. The President of the Sessions Court concluded that the kidnapping charge under s 361 of the Penal Code had been proved, having found that the girl was a minor, below the age of 16 years, and that the appellant took her without the consent of her lawful guardians, that is, her parents. The President also was satisfied that the charge of rape had been proved in that the ingredients of the offence under s 376 of the Penal Code had been proved, namely, that there was sexual intercourse between the appellant and the girl; there was penetration; and there was no consent as the girl was below the age of 14 years.

The defence contended that the lawful guardian of the girl was her father and that the commission of the offence of kidnapping had therefore not been proved. As regards the charge of rape, the defence submitted that the girl was a 'totally incredible witness'.

It was also argued that the sentences of four years' imprisonment with effect from the date of arrest on the kidnapping conviction and six years' imprisonment with effect from the date of arrest and a fine of $5,000 in default nine months' imprisonment in respect of the rape conviction were excessive.

Held, reducing the sentence for kidnapping while affirming the sentence for rape:

(1) By s 5 of the Guardianship of Infants Act 1961, the father of an infant shall be the guardian of the infant. By s 1(2) of the Act, nothing in the Act shall apply in any State to persons professing the Muslim religion until the Act has been adopted by a law made by the legislature of that State. In the State of Selangor, the Act had been adopted by Enactment 6 of 1961 and by virtue of s 6(1) of the Constitution (Amendment) (No 2) Act 1973 (Act A206), the said Enactment continued in the Federal Territory.

(2) In considering the expression 'lawful guardian' contained in s 361 of the Code, the court must give it a meaning which accords, not only with s 5 of the Guardianship of Infants Act but also with the explanation provided to s 361 of the Code. The explanation states that the words 'lawful guardian' in the section include any person lawfully entrusted with the care or custody of such minor or other person. The words 'lawfully entrusted' must be construed liberally. It is not intended that the entrustment should be made in a formal manner. It can be done orally and it is not even necessary that there should be direct evidence available about the entrustment as such. From the course of conduct and from the other surrounding circumstances it would be open to the court to infer lawful entrustment in favour of the person in whose custody the minor is living and who is taking her care in all reasonable ways.

(3) In view of the evidence and in the circumstances of this case, it was clear that the mother was also the lawful guardian.

(4) From the evidence, it was clear that the appellant took the girl out of the keeping of the lawful guardianship of her parents. The taking was done without the consent of her parents. It might be possible that the girl consented to go with the appellant. But even if she had consented, her consent was immaterial for the commission of the offence under s 361 of the Penal Code.

(5) The evidence of the girl regarding her acts of sexual intercourse with the appellant was sufficiently corroborated by the two doctors who examined the girl and the appellant respectively. In a case of this nature, medical evidence is sufficient to corroborate the evidence of the girl.

(6) It was immaterial whether the girl gave her consent or not. A person commits the offence of rape when he has sexual intercourse with a girl below the age of 14 years.

(7) In the present case, in regard to the kidnapping conviction, the sentence was excessive and should be reduced to two years' imprisonment from the date of arrest. In respect of the rape conviction, the sentence was not manifestly excessive and should not be disturbed. The sentences were to run concurrently.

Cases referred to

1 *DPP* v *Abdul Rahman* [1963] MLJ 213 (folld)
2 *State* v *Harbansing Kisangsing* [1954] Cr LJ 1032 (folld)
3 *Neelakandan* v *PP* [1956] MLJ 208 (folld)
4 *Brabakaran* v *PP* [1966] 1 MLJ 64 (refd)
5 *PP* v *Selvarajah* [1984] 1 MLJ 93 (refd)